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IN THE

Supreme Court of the United States

October Term, 1998

Guy Mitchell, et al.,
Petitioners,
v.
Mary L. Helms, et al.
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Brief Amicus Curiae on behalf of Arizona Council for Academic Private Education, Association of Christian Schools International, Connecticut Council for American Private Education, Florida Council of Independent Schools, Illinois Coalition of Nonpublic Schools, Independent School Association of the Central States, Indiana Non-Public Education Association, International Christian Accrediting Association, Kentucky Non Public Schools Commission, Maryland Council for American Private Education, Michigan Association of Non-public Schools, Minnesota Independent School Forum, National Association of Independent Schools, National Catholic Educational Association, Nebraska Council for American Private Education, Texas Association of Non-Public Schools, Virginia Council for Private Education, Washington Federation of Independent Schools, and Wisconsin Council for Religious & Independent Schools, in Support of the Petitioners

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Question Presented

In light of the widespread reliance of educators upon computers in virtually all stages and phases of education, should *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977) be overruled, to the extent that they prohibit the funding of educational materials such as computers when such "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis," *Agostini v. Felton*, 521 U.S. 203 (1997)?

Table of Contents

	Page
Table of Authorities	iii
Interests of Amici	1
Summary of Argument	1
Argument	3
I. Educators all over the world, both secular and religious, use computers in virtually all stages and phases of education.	4
A. The inclusion of computers within an educational program has two principal pedagogical advantages: computers enable students to undertake research more efficiently and to think and write more carefully	7
B. The inclusion of computers within an educational program enables students to develop deeper learning that corresponds to their primary method of receiving information	8
C. Proficiency in the use of computers translates into job opportunities that Congress may foster on a neutral basis to all children, whether they attend public schools or private, nonprofit schools	10
II. To the extent that *Meek* and *Wolman* prohibit the funding of educational materials and equipment such as computers when such "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis," they should be overruled.	12
Conclusion	19

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Interests of Amici

Amici are organizations of educators at the state, national, and international levels. Their long years of experience as educators put them in a good position to be able to inform the Court about the use of computers in education. More particular descriptions of each amicus are found in the Appendix to this brief. The brief is filed with the consent of the parties.

Summary of Argument

In its cases involving aid to education of children attending religious schools, this Court has been attentive to the connection between constitutional principles and various forms of aid. In its consideration of this case, involving computers and computer software, a judicious decision must be based on an accurate understanding of the role of these resources in modern education.

The Court has held that the Establishment Clause of the First Amendment is not offended by a law requiring local public school authorities to lend *textbooks* free of charge to all students in grades seven through 12, including students attending religious schools. *Board of Educ. v. Allen*, 392 U.S. 236, 238 (1968). This holding has been affirmed in *Meek v. Pittenger*, 421 U.S. 349, 359-62 (1975) (sustaining loans of textbooks "acceptable for use in" the public schools), and in *Wolman v. Walter*, 433 U.S. 229, 236-38 (1977) (sustaining loan of books to children attending nonpublic schools).

On the other hand, the Court held in *Meek* and *Wolman* that two state programs violated the Establishment Clause by providing *instructional materials* (such as periodicals, photographs, maps, charts, sound recordings, films, or any other printed and published materials of a similar nature) or *instructional equipment* (such as slide projectors, tape recorders, and laboratory paraphernalia) to religious schools. *Meek*, 421 U.S. at 362-66; *Wolman*, 433 U.S. at 248-51.

The drawing of a constitutional line in this way has caused many commentators to cast doubt on the solidity of the Court's Establishment Clause doctrine. For example, Senator Daniel Patrick Moynihan famously wondered, if the Court deemed books permissible and maps impermissible, what the

Court might opine about an atlas. 124 CONG. REC. 25661 (Aug 11, 1978).

Similarly, commentators across a very wide spectrum of views on the Establishment Clause have criticized the Court's jurisprudence on aid to education in religious schools as unpredictable and unprincipled. For example, Jesse Choper wrote:

> Without cataloguing the school aid cases in detail, I think it is fair to say that application of the Court's three-prong test [in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)] has generated ad hoc judgments which are incapable of being reconciled on any principled basis. For example, ... [t]he state may lend school textbooks to parochial school pupils because, the court has explained, the books can be checked in advance for religious content and are "self-policing"; but the state may not lend other seemingly self-policing instructional items such as tape recorders and maps.

Jesse Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680-81 (1980); *see also* Douglas Laycock, *Towards a General Theory of the Religious Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1392-94 (1981).

The petitioners and several amici supporting them have called to the Court's attention subsequent doctrinal developments that necessitate a reexamination of the soundness of the line between books and other instructional materials. In Part I we offer the Court a simple account of the pervasive use of computers as an educational tool to enable students to undertake research and to write more cogently and effectively. We show that computers and books are functionally equivalent as alternative means of transmitting texts. And we point out important long-term economic benefits that flow from training in computer skills, benefits that accord well with the general purpose of Congress to assist the economically and educationally disadvantaged.

We urge in Part II that as a matter of practical wisdom the Court should not attempt, as the court of appeals did below, to draw a bright constitutional line between books and computers, which are functionally equivalent as alternative means of transmitting texts. We urge that the Court apply to the Chapter

2 program involved in this case the same nondiscrimination principle announced in *Agostini v. Felton*, 521 U.S. 203 (1997) with respect to a Title I program of educational benefits for the economically and educationally disadvantaged. And we urge that to the extent that *Meek* and *Wolman* can be read to contradict the nondiscrimination principle announced in *Agostini*, they should be overruled.

Argument

The statute challenged in this litigation, known as "Chapter 2," provides financial assistance through block grants to state and local educational agencies to implement eight "innovative assistance programs." *See* 20 U.S.C. §§ 7311(b); 7312(a),(c)(1); 7351. The assistance program challenged by the respondents in this case describes: "programs for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, *computer software and hardware for instructional use*, and other curricular materials which are tied to high academic standards and which will be used to improve student achievement and which are part of an overall education reform program." 20 U.S.C. § 7351(b)(2) (emphasis added). In 1988 Congress amended Chapter 2 by deleting the term "instructional equipment" (which had been interpreted by some administrators to include computer software and hardware), and expressly added the current language that is at the heart of this litigation: "computer software and hardware for instructional use." This amendment reflects a deliberate intention of Congress to address the importance of computers in today's educational environment.

Congress expressly provided that Chapter 2 services are to be provided to children enrolled in both "public and private, nonprofit schools." 20 U.S.C. § 7312. Section 7372 provides that a local educational agency shall equitably provide "secular, neutral, and nonideological services, materials, and equipment" to students who are enrolled in private nonprofit elementary and secondary schools within its boundaries. 20 U.S.C. § 7372(a)(1). Chapter 2 funds for the innovative assistance programs must supplement rather than supplant "funds from non-Federal sources." 20 U.S.C. § 7371(b). The control of Chapter 2 funds, as well as title to all Chapter 2 "materials,

equipment, and property," must be in a public agency, which "shall administer such funds and property." 20 U.S.C. § 7372(c)(1). In addition, any services provided for the benefit of private school students must be provided by a public agency or through a contractor who is "independent of such private school and of any religious organizations." 20 U.S.C. § 7372(c)(2).

Congress thus anticipated various difficulties that might arise in the administration of Chapter 2 and made a reasonable and intentional decision about the prudent allocation of funds under the taxing and spending power. In short, Congress expressly decided that computers are a vital means of education in today's world and it deliberately decided to allocate this particular aid "on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini v. Felton*, 521 U.S. 203, 231 (1997).

I. Educators all over the world, both secular and religious, use computers in virtually all stages and phases of education.

The basic purpose of a computer — to manage information to support thinking — corresponds closely to the basic mission of education. Because of this close fit between computer technology and education, computers have become a fact of life from kindergarten to the most sophisticated aspects of postgraduate work in the nation's most prestigious universities, from work on ancient texts to yesterday's pictures of the stars broadcast from the Hubbell telescope in outer space.

When texts were preserved by manuscripts, only a few could gain access to these scrolls. When movable print came along, books and pamphlets could be read by many more. Computers represent a major shift in access to information, enabling access to vast libraries of digitized information previously available only to a few specialists, and empowering people of all ages to learn more than ever before.

No judge would dream of attacking computer technology in broad stokes. A court would be laughable if it construed the Commerce Clause as authorizing an injunction against the use of computers by banks, requiring them to close down ATMs or discontinue the use of credit cards. In today's educational

world, an injunction against the use of public funds for "computer software and hardware for instructional use" in religious schools, such as that issued by the court of appeals in this case, is no less problematic. The view of the court of appeals lacks all three of the attributes that three members of this Court found to be requisites for constitutional rules in this area, that they be "sensible ... sound ... and ... necessary." *Agostini*, 521 U.S. at 247 (Souter, J., dissenting, joined by Justices Stevens and Ginsburg). On the contrary, as we show in this brief, the position of the court of appeals makes no sense pedagogically, and it is clearly not doctrinally sound after *Agostini*.

There are two telling indications that the crabbed reading of the Court's precedents adopted by the court of appeals in this case is unnecessary. First, after the Court's ruling in *Aguilar v. Felton*, 473 U.S. 402 (1985) restricted access of public school teachers to offer remedial math and reading on the campuses of religious schools, public school administrators charged with the implementation of the Chapter 1 program frequently carried out the statutory mandate by providing computer-assisted instruction to children in religious schools. *See, e.g.*, REINVENTING CHAPTER 1: FINAL REPORT OF THE NATIONAL ASSESSMENT OF CHAPTER 1 PROGRAM 136, 138-41 (U.S. Dept. of Education, Feb. 1993). This form of compliance with Title I was challenged only once, and the district court rejected that challenge. *Committee for Public Educ. and Religious Liberty v. Secretary, U.S. Dept. of Ed.*, 942 F. Supp. 842 (E.D.N.Y. 1996), cited in *Agostini, supra*, 521 U.S. at 234. Thus throughout the nation, between *Aguilar* and its reversal in *Agostini*, computer-assisted instruction was widely regarded as a permissible way of providing Chapter 1 or Title I services. It is significant that computer-assisted instruction was not challenged in the litigation in the district court in this case.

Second, another court of appeals has already illustrated an alternative reading of Chapter 2 and the precedents of this Court. *Walker v. San Francisco Unified School District, et al.*, 46 F. 3d 1449, 1454, 1458, 1467 (9th Cir. 1995) (sustaining Chapter 2 on the ground that it did not target or disproportionately benefit religious institutions). Thus the opinion of the court of appeals in this case is emphatically unnecessary.

Amici urge the Court to consider carefully whether any construction of the constitution that hurts education and that needlessly harms good pedagogy is sound, sensible, or neces-

sary. It is the educational policy challenged in this case that is sound, sensible and necessary, and the Court should defer to the judgment of Congress on this matter. Underlying the congressional policy are several legitimate concerns. For example, having come to an awareness of the essential role of computers in conducting its own business, Congress correctly judged that the rapid changes in computer technology have enormous potential in educational uses, and did not wish to allow many schools throughout the nation to be left behind in the rapidly advancing information age.

There is still a lot of progress to occur. As recently as 1993 Reed Hunt, then chairman of the Federal Communications Commission, could state: "There are thousands of buildings in this country with millions of people in them who have no telephones, no cable television, and no reasonable prospect of broadband services. They are called schools." Richard Kahlenberg, "Give Schools a Ride on the Information Highway Media: A PC for every student is possible if utility regulators and the industry cooperate," *Los Angeles Times* (Jan. 10, 1994), 1994 WL 2123178.

Congress was thus aware that the place where computers might be most useful — schools — might unfortunately be the last place where they might be found in desirable numbers, without some form of federal financial support. Congress amended Chapter 2 accordingly, and has repeatedly passed appropriations after that amendment to reflect an ongoing concern for supporting the use of computers in education. The distinction between books and computers drawn by the court of appeals in this case, *Helms v. Picard*, 151 F.3d 347, 374 (5th Cir. 1998) thus cuts entirely against a sensible and sound statement of congressional policy. Whether or not this educational policy is truly necessary ought to be left to debate in the political branches. It is certainly well within the meaning of the "necessary and proper" provision of the enumerated powers of Congress. U.S. Const., Art I, § 8.

Like education, PCs are focused on information — how to get it, how to organize it, how to keep it at hand, how to disseminate it. That is not all that is comprehended by a good education. For example, reflection on information is obviously necessary to sort wheat from chaff. But most educators now heartily agree that the positive benefits of computers in education powerfully outweigh their potential negative impact on

students. Thus a leading commentator on education in religious schools could state recently:

> Computer technology is an integral part of education.... Internet access to global libraries, museums, other research and cultural resources, and outstanding educators and lecturers expose students to sources of information and insights inaccessible in conventional classrooms or remote classrooms.... [S]chools that cannot take advantage of these opportunities will graduate students at a distinct disadvantage in a society that is becoming dependent on and driven by technology.

Dale McDonald, *The Telecommunications Act of 1996 and its Impact on Catholic Education*, 3 CATHOLIC EDUCATION 107, 112 (1999); *see also* Bill Gates, *The Road Ahead* 214 (rev. ed. 1996) (productivity advantages of PCs will become so apparent in the years ahead that it will seems unthinkable to exclude students from the benefits).

A. The inclusion of computers within an educational program has two principal pedagogical advantages: computers enable students to undertake research more efficiently and to think and write more carefully.

Computers are not the be-all and end-all of education. There are a lot of things besides technology — of whatever form — that are critically important in the design of a sound education. For example, a sound education must motivate students to learn. There can be no serious learning without serious study by serious students, and technology will not magically overcome bad habits or sloth. In our experience in operating schools, however, we have learned that computers have had a very positive effect upon teachers as well as students.

Assume, for example, that a school decides to foster an awareness of the Holocaust as a unit in its history curriculum. Within an hour online, teachers with a bare modicum of computer searching skills would be able to generate a huge list of websites on this topic and would be able to compile an extensive bibliography and syllabus appropriate to the age of their students. The teacher could assign passages from *The Diary of Anne Frank* or ask students to see footage from the National Archives.

Similarly, students in a school equipped with computers connected to the internet by a modem would be able to use their computer searching skills — which are often more advanced than those of their teachers — to bring new information to bear on specific topics that they might find as they surf the web. In the same instant students all over the country can be linked to the resources of the United States Holocaust Memorial Museum and to other archives, and they can rapidly assess the truth of the claim that the Holocaust never occurred. Computers, in short, open the door to vast opportunities for learning that were simply not present in this way for most children as recently as a decade ago.

Another significant educational use of computers is in teaching students to write correctly and persuasively. As with online research which proceeds at the pace of the researcher, so also students can learn the skills of word processing through software designed to enable them to understand progressively at their own pace. Once again, we are under no illusion that learning can occur without serious effort by students. For example, spelling errors cannot be eliminated by the use of a spellchecker, and grammatical mistakes will not disappear by invoking a program like Grammatik®. But tools of this sort can assist students to improve their awareness that there are acceptable and unacceptable ways of spelling and expressing things. And the ease with which a file can be saved and reworked helps to communicate to students that revision of written work is the only way that we make improvement in the logic of our organization, the clarity of our expression, or the elegance of our diction.

B. The inclusion of computers within an educational program enables students to develop deeper learning that corresponds to their primary method of receiving information.

For decades educators and psychologists have known that people learn in different primary modalities of perception. Some learn primarily through seeing things. When they understand, they will typically say, "Oh, I see the point now" or use some other visual image to describe the act of insight. Others learn primarily through hearing. When they understand, they will typically say, "I hear you," or "That rings true," or

"That's as clear as a bell," or use some other auditory image to describe the act of insight. A third group learns primarily through coming into contact with things and touching them. When they understand, they will typically say, "I can connect with that idea," or "I can grasp what you mean" or use some other kinesthetic or tactile image to describe the act of insight.

This view of the modalities of perception is not only widely accepted in the field of psychology. It is also firmly supported by a vast literature of educational research supporting the validity of this view in a wide variety of applications in the field of education, such as training of teachers and testing of students. In short, educational outputs or results improve when attention is paid in the learning experience to the differences in modalities of perception, and they go down when this critical dimension of human consciousness is ignored. *See, e.g.*, Stephen N. Elliott, ed., *Educational Psychology: Effective Teaching Effective Learning* (1999); Gavriel Salomon, ed., *Distributed Cognitions: Psychological and Educational Considerations* (1996); Steven R. Banks & Charles L. Thompson, *Educational Psychology: For Teachers in Training* 218-23 (1995); Robert L. Hohn, *Classroom Learning and Teaching* (1995); Mary P. Driscoll, *Psychology of Learning for Instruction* (1994); Kate McGilly, ed., *Classroom Lessons: Integrating Cognitive Theory and Classroom Practice* (1994); Ellen D. Gagne, Carol Walker Yekovich & Frank R. Yekovich, *The Cognitive Psychology of School Learning* (1993); John J. Hoover, *Classroom Applications of Cognitive Learning Styles* (1991).

The line dividing modalities of perception is not hard and fast, or without overlap. A person typically learns in all three modes of perception. Thus a primarily visual person may still have to attend lectures and go off to a laboratory to touch and weigh things and conduct experiments as part of the process of coming to understand scientific method. But one of these modes of perception — seeing, hearing, touching — is usually primary; another secondary, and the third tertiary. Good teachers know this; and they try to include all three forms of teaching to enable all three kinds of students to have a solid learning experience. They, of course, rely on conversation so that information can be heard by all of their students, but especially by those whose primary mode of perception is auditory. Like good actors and charismatic speakers, moreover, they

engage their audience by changing the tonality and volume of their voice, and they augment the learning experience by using audio aids such as recordings in the classroom. They also paint verbal pictures for their students and incorporate visual aids such as maps or timelines or graphs aimed at all students, but especially those who learn primarily by seeing. And they understand that learning must sometimes literally be "hands on." In short, good teachers employ all three representational systems. Dull teachers by contrast bore their students not just by talking to them most of the time and rarely listening to them, but also by omitting any visual images from their lessons and by omitting any hands-on learning from the classroom.

The relevance of this point to this case is that computers are an extraordinarily flexible educational tool easily adaptable to all three modes of learning. With a modern PC equipped with a CD-ROM drive, students with differing primary modes of perception can learn by seeing information on a monitor, by listening to accompanying sounds, and by touching a keyboard and getting instructions for other hands-on experience. The interactive character of a PC, moreover, explains in large measure why children — even preschoolers — get along so well with computers.

C. Proficiency in the use of computers translates into job opportunities that Congress may foster on a neutral basis to all children, whether they attend public or private, nonprofit schools.

There is a great demand in this country for a competitively educated workforce. Employers are increasingly looking for workers with skills in languages, mathematics, and in the use of computers. Greater proficiency in computer skills is typically associated with an increase in productivity, which is in turn rewarded financially. For this reason futurists have predicted that the economic class division in the next century will be between highly paid information workers and low-paid workers in the service industry. Researchers have identified a growing gap between rich and poor children, and between black and white children in access to computers. *See, e.g.*, Gary Chapman, "The Cutting Edge Digital Nation Reaching Out to Bring Low-Income Blacks Across the 'Digital Divide,'" *Los Angeles Times* (Apr. 12, 1999), 1999 WL 2148223

(reporting 1998 Vanderbilt University study that found that poor schools with predominantly minority students have twice as many students per computer, on average, as middle-class white schools, and that white families are roughly twice as likely to own a home computer as black families). Recently the FCC authorized a $1-billion increase in funding over the next year for a program to wire the nation's schools and libraries for Internet access. FCC Chairman William Kennard stated that this investment would "pay dividends for generations for many years to come" by helping to "narrow the digital divide" between better-connected suburban school districts and their largely unconnected poor, inner-city and rural counterparts. *See* Jube Shiver, "FCC Boosts School Internet Funding," *Los Angeles Times* (May 28, 1999), 1999 WL 2162872. Chapter 2 is designed to enable access by all American children to computer-assisted education, and reflects sound congressional policy to overcome a digital divide between rich and poor children, whether in public or private schools. *See, e.g.*, Testimony of Dr. Linda Roberts, Director, Office of Education Technology, U.S. Dept. of Education, Before the House Committee on Commerce and the House Committee on Education and the Workforce, Sept. 16, 1998.

Training children to become proficient in computer skills can have profoundly important and long-lasting economic consequences for their future. Thus the general purpose of Chapter 2 is correlated with the more specific purpose of the Title I program at issue in *Aguilar* and *Agostini*. Title I was the centerpiece of a congressional effort to "bring better education to millions of disadvantaged youth who need it most." S. Rep. No. 89-146 (1965), reprinted in 1965 U.S. Code Cong. Admin. News 1446, 1450. Having determined that "there is a close relationship between conditions of poverty and lack of educational development," *id.*, Congress passed Title I to provide financial assistance to local educational agencies serving areas with concentrations of children from low-income families. By enabling local educational agencies to expand and improve their programs for meeting the special educational needs of economically and educationally deprived children, this legislation was to be a "very potent instrument ... in the eradication of poverty and its effects." *Id.*

A similar commitment to equitable distribution of resources to assist the economically and educationally disadvantaged is

expressly found in the reservation of 15% of the federal funds for Chapter 2 to schools with children of low-income parents. 20 U.S.C. § 7312(a). Thus part of the intent of Congress was to provide funds in a way that would have an egalitarian effect for schools with meager additional resources.

It is true that Chapter 2 is aimed much more broadly at improving the quality of education in America generally. It is likewise true that the tools Congress chose to fund in Chapter 2 differ in form from those it chose for that purpose in enacting Title I. Title I provided for instructors of remedial reading and mathematics. Chapter 2 provides "secular, neutral, and nonideological services, materials, and equipment" to students enrolled in private nonprofit elementary and secondary schools. 20 U.S.C. § 7372(a)(1). But the difference between Title I and Chapter 2 is not a constitutional difference; it is a legislative one. Having sustained the application of the Title I program in New York, *Agostini*, *supra*, this Court should now sustain the Chapter 2 program challenged here. The alternative is to return to the pre-*Agostini* period characterized by a leading commentator as "ad hoc judgments which are incapable of being reconciled on any principled basis." Jesse Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680 (1980); *see also* Douglas Laycock, *Towards a General Theory of the Religious Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1392-94 (1981).

II. To the extent that *Meek* and *Wolman* prohibit the funding of educational materials or equipment such as computers when such "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis," they should be overruled.

The court of appeals noted that *Agostini* did not formally overrule *Meek v. Pittenger*, 421 U.S. 349 (1975) or *Wolman v. Walter*, 433 U.S. 229 (1977). The court of appeals chose to read *Agostini* narrowly, limiting it to its facts: "*Agostini* holds only that the aid at issue there (i.e., the on-premises provision of special education services by state-paid teachers) was not the kind of governmental aid that impermissibly advanced religion." *Helms v. Picard*, *supra*, 151 F.3d 347, at 374. This Court could conceivably decide to limit the reach of the nondiscrimination principle announced in *Agostini* to the precise facts in the record of that case — the offering of remedial instruction in reading and mathematics on the premises of a religious school — and to virtually nothing else. But this reads *Agostini* much too narrowly. For example, a district court recently relied on *Agostini* in sustaining a state program subsidizing telecommunications access for public and private schools. The court wrote in *Freedom From Religion Foundation v. Bugher*, __ F. Supp. 2d __, 1999 WL 500025, No. 98-C-767-S (W.D. Wis. June 23, 1999):

> Where, as here, a benefit not essential to the operation of the school goes directly to the students in kind regardless of their choice to attend a secular or sectarian school, the school's delivery of the benefit does not render the program unconstitutional. *See Agostini v. Felton*, 521 U.S. 203, 228-30 (1997).

The reading of *Agostini* by the court of appeals also misapprehends the nature of this Court's role. This Court sits not to decide every possible application of general rules to specific facts, but to offer clear, principled guidance — as it did in *Agostini* — that this Court may reasonably expect the lower courts to follow and to apply thoughtfully in analogous cases.

The opinion of the court below may be read as a plea for further help from this Court. For example, the court of appeals wrote: "*Agostini* says nothing about the loan of instructional materials to parochial schools and we therefore do not read it as overruling *Meek* or *Wolman*. *Agostini* only instructs us that *Meek*'s presumption regarding instructional materials should not be applied to state-paid teachers on parochial schools premises." *Helms v. Picard*, *supra*, 151 F.3d 347, at 374. And the lower court stated: "When we carefully review the Supreme Court's pronouncements in *Allen*, *Meek*, *Wolman*, and *Regan*, it is tempting to complain that the high Court has instructed us confusingly." *Id.* at 371. All the Court need do now is to instruct the lower courts without any ambiguity.

Sometimes a principle must be repeated even though it was clear and sound in its first iteration. It is true in a formalistic way that the facts of *Agostini* — involving the permissibility of remedial reading and mathematical instruction on the premises of a religious school — did not offer this Court an

opportunity to revisit the precise factual situation at issue in *Meek* and *Wolman* — the distinction between textbooks and other nonideological educational materials and equipment. The record in this case, however, squarely presents an opportunity to revisit *Meek* and *Wolman*.

Amici urge that the sound path for the Court to follow at this point of its elaboration of the meaning of the Establishment Clause is to clarify that the nondiscrimination principle announced in *Agostini* applies to the congressional program challenged here. We offer five reasons in support of this conclusion.

First, the *Agostini* Court has already taken the substantive step of disapproving two flawed principles in *Meek* and *Wolman*. As the court of appeals in this case acknowledged, *Agostini* discarded "a premise on which *Meek* relied—i.e., that '[s]ubstantial aid to the educational function of [sectarian] schools ... *necessarily* results in aid to the sectarian school enterprise as a whole.' *Meek*, 421 U.S. at 366."(emphasis added). *Helms v. Picard*, 151 F. 3d at 373. And the court below also recognized that *Agostini* "depart[ed] from the rule ... that all government aid that directly aids the educational function of religious schools is invalid." *Id.* at 373-74. Thus the basis for overruling *Meek* and *Wolman* is already at hand in *Agostini*. All that the Court need do now is say so.

Second, *Agostini* itself offers an example of reversing previous inconsistent precedents. In *Agostini*, the Court flatly overruled *Aguilar v. Felton*, 473 U.S. 402 (1985). It also overruled the portion of *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985) that had invalidated the "Shared Time" program in that case, as inconsistent with the Court's more recent Establishment Clause decisions. *See, e.g., Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 12-13 (1993) (abandoning the presumption in *Ball* that public employees placed on parochial school grounds will inevitably inculcate religion or that their presence constitutes a symbolic union between government and religion); *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 487 (1986) (departing from rule in *Ball* that all government aid that directly aids the educational function of religious schools is invalid). The *Agostini* Court clarified a principled basis for overruling *Aguilar* and *Ball*. And the same broad principle of nondiscrimination may now be relied upon to overrule the portions of *Meek* and *Wolman* that

are inconsistent with this principle.

Third, there were serious difficulties with the per se approach adopted by the Court in *Meek* and *Wolman* when these cases were first announced. An absolute ban on all forms of educational materials and equipment has the advantage of clarity, but the distinct disadvantage of a rigid rule with no plausible rationale to support it. Under the approach adopted in *Meek* and *Wolman*, no demonstration of facts was necessary either to support or to rebut the a priori judgment that financial aid was impermissible because of the mere *possibility* of excessive (an inherently subjective term) entanglement. Thus Chief Justice Burger, the author of the entanglement test in *Lemon, supra*, could complain in *Meek*: "There is absolutely no support in this record or, for that matter, in ordinary human experience to support the concern some see with respect to the 'dangers' lurking in extending common, nonsectarian tools of the education process — especially remedial tools — to students in private schools." *Meek, supra*, 421 U.S. at 385 (Burger, C.J., concurring in the judgment in part and dissenting in part). *Wolman* in turn reinforced a rule that Justice Marshall deemed based only on the "fear of imaginable but totally implausible evils," *Wolman*, 433 U.S. at 260, note 6 (Marshall, J., concurring and dissenting).

Although the conclusion reached in *Meek* and *Wolman* made little or no sense to educators as a pedagogical matter, the categorical approach the Court adopted in those cases was again followed in *Aguilar*, where the Court again pronounced a rigid per se rule — remedial instruction just off the campus of a religious school was permissible but remedial instruction on the premises of such a school was impermissible — that made no practical sense and that admitted of no factual rebuttal. It is precisely this rigid, per se approach of *Aguilar* that the Court rejected in *Agostini*, and that the Court should now reject in this case.

Fourth, the role of computer technology in education (*see* Part I of this brief above) offers the Court a new basis for assessing the permissibility of the provision of computer technology as part of the array of nonideological educational assistance that may be "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and ... made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini, supra*, 521 U.S. at 531. The

nature of computer technology was not known or discussed when *Meek* and *Wolman* were decided. If sidewalks in a company owned town are the functional equivalent of public sidewalks, *Marsh v. Alabama*, 326 U.S. 501 (1943), computers are no less the functional equivalent of books. There are differences between books and computers, but the most significant difference is that information contained in books is more circumscribed in spatial terms than the identical information available on the information superhighway. With computers, millions can have access to the same text at the same moment and can even interact with one another in real time all over the world. Books and computers are simply two distinct means of getting access to texts, whether on paper hard copy, or in bits and bytes that appear on a screen. The constitutionality of congressional power to assist the education of all American children should not be made to turn on the means of gaining access to the information contained in both systems. Whether the ABC's and the 123's appear in a book or on a computer monitor should be of no constitutional significance whatever.

The major technological advances that have occurred in the space of the past quarter century have made the Court's constitutional line between books and other modes of education unworkable and untenable today, if it ever was rational 25 years ago. A generation (or 2 or 3 or 10, depending on how one measures the swift passing of a computer generation, which is typically very short) into the cybernetic revolution, the Court's line in *Meek* and *Wolman* now seems quaint and even antiquated. For this reason alone, it seems prudent for the Court to reaffirm the nondiscrimination principle in *Agostini* and to overrule those aspects of *Meek* and *Wolman* that are inconsistent with *Agostini*.

The Court, moreover, has already cracked the nut of computer technology in a variety of ways. The rules of this Court (as well as those of several federal and state appellate courts) assume the use of computers by the lawyers who practice in this Court. So do the Court's current practices of undertaking computerized research in chambers, of preparing its orders and opinions in word processing programs rather than on typewriters, of releasing its decisions online electronically the moment they are being announced from the bench of the Court, and of indexing and cataloguing the hardcopy volumes in the Court's library.

Fifth, and perhaps most importantly, the Court's First Amendment jurisprudence has come to terms with major technological shifts in communication. When motion pictures first came about, a film producer unsuccessfully challenged a state statute that required the prior approval of a board of censors before any film could be publicly exhibited in the state, and that directed the board to approve only such films as it adjudged to be "of a moral, educational, or amusing and harmless character." *Mutual Film Corp. v. Industrial Comm. of Ohio*, 236 U.S. 230 (1915). Although this early case was limited to an opinion about state constitutional law, it contained dictum to the effect that movies do not enjoy constitutional protection because of their commercial character.[1]

Today the Court's view in *Mutual Film* seems bizarre for two reasons. First, the Court now extends greater protection to commercial speech generally than it used to in the past, *see, e.g., Greater New Orleans Broadcasting Association, Inc., v. United States*, 119 S.Ct. 1923 (1999). Second, in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), the Court acknowledged the importance of motion pictures as a "significant medium for the communication of ideas," *id.* at 501, and expressly rejected the view that motion pictures are not protected by the First Amendment because they are "a large-scale business conducted for private profit." *Id.*

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[1] Before this Court's ruling in *Gitlow v. New York*, 268 U.S. 652 (1925), that the First Amendment guarantee of freedom of speech is secured by the Fourteenth Amendment against state intrusion of that freedom, the district Court ruled that the first eight Amendments were not a restriction on state action. *Mutual Film Corp. v. Industrial Comm. of Ohio*, 215 F. 138, 141 (N.D. Ohio 1914). On appeal to this Court, the film company abandoned its claim that the state statute violated the Fourteenth Amendment, contending merely that the statute violated the freedom of speech and publication guaranteed by the Constitution of Ohio. This Court thus had no federal question to review on appeal, and affirmed the decree denying injunctive relief on the view that the state constitutional protection of freedom of the press did not extend to the exhibition of moving pictures, which the Court characterized as "a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded ... as part of the press of the country, or as organs of public opinion." *Mutual Film*, 236 U.S. at 244.

Once the Court came to the wise conclusion that films were simply a different mode of communicating ideas, it followed that films deserved as much protection as that afforded to other media of communication. The Court and commentators began to speak more broadly of protecting expression, irrespective of the particular medium of communication employed in a given instance. For over half a century the Court has not confined the protection of the free press clause to printing as it existed in the late eighteenth century, but has extended it, in turn, to various new means of communicating ideas as they developed. *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (radio); *Associated Press v. United States*, 326 U.S. 1 (1945) (applying Sherman Act to wire service on the ground that "freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not"); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (motion pictures); *Burstyn, supra* (same); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (broadcast television); *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (interaction of owners of copyrights on television programs with manufacturers of home videotape recorders); *Turner Broadcasting System, Inc., v. Federal Communications Commission*, 512 U.S. 622 (1994) (cable networks); and *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (the internet). Thus in *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) the Court could state: "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee."

Having come all the way from the printing press to the internet in its application of the free speech and free press provisions of the First Amendment to various forms of technology related to the gathering and dissemination of information, the Court should not remain committed to an outdated mode of analysis when it comes to the permissibility of the use of computers in education under the Establishment Clause. Instead, the Court should reaffirm its teaching in *Agostini* that aid is permissible when it is "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a non-

discriminatory basis," *Agostini*, 521 U.S. at 231. The Court should hold permissible the inclusion of "computer software and hardware for instructional use" within the "innovative assistance programs," 20 U.S.C. §§ 7311(b), that Congress has chosen to fund as "part of an overall education reform program" to assist children enrolled in both "public and private, nonprofit schools." 20 U.S.C. § 7351(b)(2). Any suggestion to the contrary in *Meek* and *Wolman* should now be overruled.

Conclusion

The court of appeals should be reversed.

Respectfully submitted,

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Appendix: Statements of Interest of Amici Curiae

The Arizona Council for Academic Private Education serves eight member organizations operating nonpublic schools in Arizona. These member organizations are non profit and subscribe to the nondiscriminatory admissions policies with regard to race, color, and national origin. The current members are the Arizona Association of Independent Academic Schools, the Arizona Catholic Conference, the Arizona Society of Hebrew Day Schools, the Catholic Schools — Diocese of Phoenix, the Catholic Schools — Diocese of Tucson, the Episcopal Diocese of Arizona, the Association of Independent Schools of Southern Arizona, the Lutheran Schools of Arizona - Missouri Synod, and the Seventh-Day Adventist Schools.

The Association of Christian Schools International (ACSI) is a non-profit 501(c)(3) organization which serves the evangelical Christian community of early education, elementary, secondary, and postsecondary education in the United States and around the world. Headquartered in Colorado Springs, Colorado, ACSI is dedicated to the philosophy and promotion of evangelical Protestant Christian education. ACSI works to accomplish its mission by providing information, services and products needed by more than 4,500 member schools in 94 countries. The combined enrollment of these member schools exceeds 950,000 students. The ACSI mission: "To enable Christian educators and schools worldwide to effectively prepare students for life."

The Connecticut Council for American Private Education (CAPE) is a state organization representing private schools in Connecticut. The Council meets monthly to discuss pertinent issues involving private education.

The Florida Council of Independent Schools (FCIS) represents over 60,000 students and 6,000 educators in 140 independent schools in the state of Florida. Founded in 1954, FCIS assures that member schools maintain high standards and independence of character.

The Illinois Coalition of Nonpublic Schools (ICNS) is a broad-based coalition of eighteen (18) diverse nonpublic school organizations, including both faith-based and independent schools. The representative organizations account for 14-17% of the student population in the state of Illinois (over

325,000 students) and constitute approximately 1,500 local nonpublic schools.

The Independent Schools Association of the Central States (ISACS) is a membership organization of independent schools, representing and accrediting over 200 schools within fifteen states in the Midwest, representing over 80,000 students.

The Indiana Non-Public Education Association (INPEA) is an association of non-public schools in the State of Indiana. It represents over 400 schools serving more than 94,500 students preschool through grade 12. As a not-for-profit organization, it is guided and administered by a Board of Directors composed of representatives from six geographical regions of the state and a representative from each of the following non-public school jurisdictions: Association of Christian Schools International (ACSI), Christian Schools International (CSI), Indiana Association of Independent Schools (IAIS), Lutheran Church-Missouri Synod (LCMS), Lutheran Association for Elementary Education (LAEE - Fort Wayne), Seventh-day Adventists, Archdiocese of Indianapolis, Diocese of Evansville, Diocese of Fort Wayne-South Bend, Diocese of Gary, Diocese of Lafayette. Through its commitment to quality education, INPEA serves to unify its affiliated schools while respecting their diversity. The Association is organized to provide a framework for communication and cooperation among non-public schools in the State of Indiana, pre-school through secondary. In addition, INPEA strives to maintain productive relationships with the Indiana State Department of Education, the federal government, and other agencies, which impact quality education

The International Christian Accrediting Association (ICAA) assists Christian educational institutions - preschool through postsecondary - in the improvement of education within its Christian distinctives by establishing an organizational witness to their credibility of performance, integrity, and quality. The first schools were accredited by ICAA in 1987 and as of now over 140 schools from 30 states and seventeen nations are part of the organization.

The Kentucky Non Public Schools Commission represents over 200 private and religious schools in the Commonwealth of Kentucky educating nearly 50,000 students. The commission is recognized the by the State of Kentucky, through the

General Assembly and through the Kentucky Department of Education as the accrediting agency for all the non public schools in Kentucky.

The Maryland Council for American Private Education (CAPE) represents a coalition of organizations serving private elementary and secondary schools in the state of Maryland. The purpose of CAPE is to assist and strengthen the efforts of member organizations and the private school children whom they serve.

The Michigan Association of Non-public Schools (M-A-N-S) is an association serving the Catholic schools of the seven Catholic dioceses of Michigan, the Michigan District of the Christian Schools International, and the Michigan District of the Lutheran Church-Missouri Synod Schools. M-A-N-S operates with the voluntary support of its 543 schools with more than 7,000 teachers educating over 137,000 students in the state.

The Minnesota Independent School Forum (MISF) is a thirty-five member coalition of collaborative religious and non-sectarian secondary schools. MISF schools educate over 13,400 teenagers or 85% of Minnesota's private high school students. In addition, MISF provides professional development opportunities, publications and other services for all 540 non-public schools in the state.

The National Association of Independent Schools (NAIS) is a voluntary membership organization of over 1,100 private, independent, elementary and secondary schools and associations in the U.S. and abroad. It represents approximately 456,000 students, 60,400 teachers and instruction support staff, and 10,200 administrators.

The National Catholic Educational Association (NCEA) is the largest private professional education association in the world. Founded in 1904, the association's membership includes more than 200,000 educators serving 7.6 million students at all levels from pre-K through graduate school.

The Nebraska Council for American Private Education is a state-wide organization of the following school systems: Lutheran Church-Missouri Synod, Nebraska Conference of Seventh-day Adventists, Catholic Archdiocese of Omaha, Catholic Diocese of Lincoln, and Catholic Diocese of Grand Island. The organization serves as a liaison to both state and federal agencies on behalf of 30,000 private school students and their

families.

The Texas Association of Non-Public Schools (TANS) is an organization representing schools accredited by the twelve commissions recognized by the Texas Education Agency for the purpose of accrediting non-public schools. Non-Public schools in Texas that are accredited currently number 742 with a population of over 300,000 students. TANS supports sound legal arguments in favor of nondiscriminatory financial or other support to non-public schools regardless of their religion.

The Virginia Council for Private Education (VCPE) is a statewide organization representing 370 private schools in Virginia, including Catholic, Episcopal, Hebrew Day, independent, Lutheran, Montessori, and Seventh-day Adventist schools. VCPE supports nondiscriminatory funding for computers (hardware and software) in all schools, including religious schools.

The Washington Federation of Independent Schools is an association of private/independent schools with membership representing 75% of the more than 80,000 private school students in the State of Washington. As the affiliate of the Council for American Private Education in the state, our mission is to strengthen education for the students of Washington as the advocate and voice of independent schools.

The Wisconsin Council for Religious & Independent Schools was formed in 1974. It represents 125,000 of the state's 149,000 students attending nonpublic schools, and 750 of the state's 900 nonpublic schools. It serves as the liaison on behalf of its members with the Wisconsin Department of Public Instruction, which is charged with administering state and federal programs such as the use of Chapter 2 funds for computers.